FILED
Court of Appeals
Division III
State of Washington
5/3/2018 12:52 PM

SUPREME COURT NO. 95828-9

NO. 35004-5-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ELIJAH MANSON,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR WALLA WALLA COUNTY

The Honorable M. Scott Wolfram, Judge

PETITION FOR REVIEW

KEVIN A. MARCH
Attorney for Petitioner

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

Page

A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION ... 1

B. ISSUE PRESENTED FOR REVIEW ... 1

C. STATEMENT OF THE CASE ... 1

D. ARGUMENT IN SUPPORT OF REVIEW ... 2

DIVISION THREE'S GENERAL ORDER ON APPELLATE COSTS CONFLICTS WITH RULES PROMULGATED BY THIS COURT—RAP 14.2 AND RAP 15.2—NECESSITATING REVIEW ... 2

E. CONCLUSION ... 9

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

City of Richland v. Wakefield
186 Wn.2d 596, 380 P.3d 459 (2016) 8

Dep't of Ecology v. Campbell & Gwinn, LLC
146 Wn.2d 1, 43 P.3d 4 (2002) 4

Jafar v. Webb
177 Wn.2d 520, 303 P.3d 1042 (2013). 4

State v. Blazina
182 Wn.2d 827, 344 P.3d 680 (2015). 8

State v. Jacobs
154 Wn.2d 596, 115 P.3d 281 (2005) 4

State v. Manson
noted at 2 Wn. App. 2d 1047, 2018 WL 1129719 (Mar. 1, 2018) 1

RULES, STATUTES AND OTHER AUTHORITIES

RAP 1.1 .... 1, 2

RAP 13.4 .... 4, 8, 9

RAP 14.2 .... 1, 2, 3, 4, 5, 6, 7, 8, 9

RAP 14.5 7

RAP 15.2 .... 1, 2, 3, 4, 5, 6, 8, 9

RAP 17.3 3

RAP 17.4 3

RCW 2.06.040 .... 1, 2

A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner Elijah Dean Manson, the appellant below, seeks review of the Court of Appeals decision in State v. Manson, noted at 2 Wn. App. 2d 1047, 2018 WL 1129719 (Mar. 1, 2018) (Appendix A), following the denial of his motion for reconsideration on April 3, 2018 (Appendix B).

B. ISSUE PRESENTED FOR REVIEW

Division Three's General Order on Appellate Costs[1] is inconsistent with RAP 14.2 and RAP 15.2 in that it requires an indigent appellant to complete additional procedural requirements and affirmatively establish continuing indigency to avoid the imposition of appellate costs. Should Division Three's General Order be stricken because, under RCW 2.06.040 and RAP 1.1(i), it conflicts with the rules promulgated by the Washington Supreme Court?

C. STATEMENT OF THE CASE

Manson lost his appeal on the merits. Appendix A at 1-9. In its decision, the Court of Appeals disagreed with Manson's argument that Division Three's General Order on Appellate Costs conflicts with RAP 14.2. Appendix A at 10.

---

[1] For ease of reference, Division Three's General Order on Appellate Costs is attached as Appendix C.

Shortly after the decision was filed, the State filed a cost bill asking that $4,865 in appellate costs be assessed against Manson. Manson timely objected. To date, Manson has not received a ruling on appellate costs.[2]

Manson moved for reconsideration, challenging only that part of the Court of Appeals decision stating that its general order does not conflict with RAP 14.2 and RAP 15.2. The Court of Appeals denied the motion for reconsideration. Appendix B.

D. ARGUMENT IN SUPPORT OF REVIEW

DIVISION THREE'S GENERAL ORDER ON APPELLATE COSTS CONFLICTS WITH RULES PROMULGATED BY THIS COURT—RAP 14.2 AND RAP 15.2—NECESSITATING REVIEW

The Court of Appeals "may establish rules supplementary to and not in conflict with rules of the supreme court." RCW 2.06.040; accord RAP 1.1(i) ("The Court of Appeals, pursuant to RCW 2.06.040, may establish rules that are supplementary to and do not conflict with rules of the Supreme Court."). "These supplementary rules will be called General Orders." RAP 1.1(i).

---

[2] If Manson receives a legally correct ruling denying appellate costs during the pendency of this petition for review, and that ruling becomes final, he will withdraw this petition. If Manson receives a legally incorrect ruling awarding appellate costs during the pendency of this petition, he will move to modify that decision and, if that proves unsuccessful, seek discretionary review of the issue in this court. Only by filing this petition may Manson preserve his challenge to Division Three's General Order in the event Division Three opts to impose appellate costs against Manson.

Division Three promulgated a general order on an adult offender's request to deny a cost award on June 10, 2016. It states, in pertinent part,

> (2) An adult offender convicted of an offense who wishes this court to exercise its discretion not to award costs in the event the State substantially prevails on appeal must make the request and provide argument in support of the request, together with citations to legal authority and references to relevant parts of the record, in the offender's opening brief or by motion as provided in Title 17 of the Rules on Appeal. Any such motion must be filed and served no later than 60 days following the filing of the appellant's opening brief. RAP 17.3 and 17.4 apply to the motion's content, filing and service and to the submission and service of any answer or reply.
>
> (3) If inability to pay is a factor alleged to support the request, then the offender should include in the record on appeal the clerk's papers, exhibits, and the report of proceedings relating to the trial court's determination of indigency and the offender's current or likely ability to pay discretionary financial obligations. The offender shall also file a report as to continued indigency and likely future inability to pay an award of costs on the form set forth below. The original report, signed by the offender under penalty of perjury, shall be filed with the court and a copy shall be served on the respondent no later than 60 days following the filing of the appellant's opening brief.

See Appendix C. This order thus requires indigent offenders to present arguments against the imposition of appellate costs in briefs or motions, or forgo their challenge to such costs. The order also mandates that indigent offenders file a report of continued indigency whenever the request for an appellate cost waiver is based on an inability to pay. These supplementary requirements conflict with RAP 14.2 and RAP 15.2 and are accordingly

legally invalid. Because of the conflict between rules promulgated by the Washington Supreme Court and supplementary rules promulgated by the Court of Appeals, RAP 13.4(b)(1) review is warranted.

Appellate courts interpret court rules using principles of statutory interpretation. Jafar v. Webb, 177 Wn.2d 520, 526, 303 P.3d 1042 (2013). "If the rule's meaning is plain on its face, we must give effect to that meaning as an expression of the drafter's intent." Id. The plain meaning of any given provision "is to be discerned from the ordinary meaning of the language at issue as well as from the context of the [court rule] in which that provision is found, related provisions, and the . . . scheme as a whole." State v. Jacobs, 154 Wn.2d 596, 600, 115 P.3d 281 (2005) (citing Dep't of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 10-12, 43 P.3d 4 (2002)). Interpretation of court rules presents a question of law that is reviewed de novo. Jafar, 177 Wn.2d at 526.

Under RAP 14.2 and RAP 15.2(f), the trial court's determination of indigency creates a rebuttable presumption that indigency continues throughout the appeal. RAP 15.2(f) mandates that appointed counsel "bring to the attention of the appellate court any significant improvement during review in the financial condition of the party." If appellate counsel has not brought any change in financial circumstances to the appellate court's attention, "[t]he appellate court will give a party the benefits of an order of

indigency throughout the review unless the appellate court finds the party's financial condition has improved to the extent that the party is no longer indigent."[3] RAP 15.2(f).

RAP 14.2 explicitly states that the RAP 15.2(f) presumption remains in effect "unless the commissioner or clerk determines by a preponderance of the evidence that the offender's financial circumstances have significantly improved since the last determination of indigency." "The commissioner or clerk may consider any evidence offered to determine the individual's current or future ability to pay." RAP 14.2.

The language of RAP 14.2 and RAP 15.2(f) is straightforward and easy to discern. An indigent appellant who remains indigent need do nothing at all to benefit from the continued presumption of indigency. If neither the State nor the offender submits evidence of significant

[3] According to the version of RAP 15.2(f) available online, "The trial court will give a party the benefits of an order of indigency throughout the review unless the appellate court finds the party's financial condition has improved to the extent that the party is no longer indigent." https://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=app&set=RAP&ruleid=apprap15.2 (last visited May 1, 2018) (emphasis added). This is inconsistent with the Thompson Reuters printed version of RAP 15.2(f), which states that it is the "appellate court" that gives the benefits of an indigency order throughout review. Manson can locate no proposed or adopted amendment to RAP 15.2(f) that would or did change "appellate court" to "trial court," which suggests that the online version is erroneous. And it would appear the online version is erroneous in any event because it makes little sense for a trial court to give benefits to a party throughout review; the benefits of an indigency order must be given effect by the appellate court. Undersigned counsel is preparing a letter to the court to address the conflict between online and print versions of the rule. Appendix D contains both a printout from the court website and a photocopy of the print version to demonstrate the inconsistency.

improvement to financial circumstances, the trial court's indigency determination remains in effect. Appellate costs may not be awarded because no evidence has been offered to rebut the presumption of indigency and therefore no clerk or commissioner has evidence to determine an offender's ability to pay.

Division Three's general order is inconsistent with the presumption of continuing indigency established by RAP 15.2(f) and RAP 14.2. The general order states that if an offender "wishes this court to exercise its discretion not to award costs in the event the State substantially prevails on appeal must make the request and provide argument in support of the request," citing legal authority and the record. As the Court of Appeals decision in this case reads, "This court's June 2016 general order requires a defendant who, on the basis of his or her indigency, wishes the court not to award the State appellate costs, to make a timely request and to submit a simple two-page form." Appendix A at 10 (emphasis added). Thus, if no two-page form is submitted and no request not to award costs is made, then Division Three will automatically impose appellate costs.

This result is simply not compatible with the continuing presumption of indigency provided for in RAP 14.2 and RAP 15.2. Under these rules, neither the offender nor the offender's attorney is required to undertake any action for the offender to continue to benefit from the trial court's indigency

determination. The only exception is the RAP 15.2(f) requirement that the offender and his or her attorney notify the appellate court of a significant improvement in finances if there is one.

To further illustrate the conflict between Division Three's general order and the rules of appellate procedure, in 2016, this court proposed its own amendments to RAP 14.2 that contained a reporting requirement similar to what Division Three currently requires. This court's 2016 proposal read, in relevant part,

> An indigent adult offender who objects to a cost bill pursuant to RAP 14.5 shall file a report as to continued indigency and likely future ability to pay an award of costs on a form prescribed by the office of public defense. The form need not reiterate information contained in the trial court indigency screening form, but shall include supplemental information necessary to provide a basis for making a determination with respect to the individual's current or likely future ability to pay such costs. The form shall include a certification that no significant improvement during review in the financial condition of the indigent adult offender has occurred or, if a significant improvement during review in the financial condition has occurred, shall describe such improvements.

Proposed RAP 14.2, available at https://www.courts.wa.gov/court_rules/?fa=court_rules.proposedRuleDisplay&ruleId=535 (last visited May 1, 2018).[4] But, ostensibly based on the negative comments submitted about the reporting requirement, this court rejected this proposed amendment and instead amended RAP 14.2 to read as it currently does, giving a presumption

[4] For ease of reference, Manson attaches this proposed amendment to RAP 14.2 as Appendix E.

of continuing indigency. Because this court rejected its own proposal for a reporting requirement, this court should take review to reject Division Three's general order that imposes a very similar reporting requirement.

Even though Manson complied with the general order and even though his report indicates he remains indigent,[5] the State filed a cost bill anyway, seeking nearly $5,000 in appellate costs against Manson. Manson has objected. But, if costs are awarded against Manson—for instance, based on the information he provided in his report indicating he could pay $25 per month—then the award will be based on information that RAP 14.2 and RAP 15.2(f) did not require Manson to supply.[6] Division Three's general order on appellate costs conflicts with RAP 14.2 and RAP 15.2(f). This conflict makes RAP 13.4(b)(1) review appropriate.

Finally, this petition should also be granted pursuant to RAP 13.4(b)(4) as an issue of substantial public importance. Not all indigent persons will be able to comply with Division Three's general order. It is not

---

[5] Although Manson filed the report Division Three currently requires, he did not so without objection to this procedural requirement.

[6] As Manson argued in his objection to the cost bill, which is still pending in Division Three, a person like Manson who qualifies for state assistance and who can only pay a small monthly amount should not be considered able to pay LFOs. City of Richland v. Wakefield, 186 Wn.2d 596, 607, 380 P.3d 459 (2016); State v. Blazina, 182 Wn.2d 827, 836-38, 344 P.3d 680 (2015). A $25 per month requirement would be "unjustly punitive" given that it "will only cause [Manson's] LFO amount to increase." Wakefield, 196 Wn.2d at 607. Manson intends to brief his ability to pay more thoroughly in the event Division Three assesses appellate costs against him.

uncommon for indigent offenders to be totally or partially illiterate or suffer from other disabilities that make them unable to read or fill out the report. It is not uncommon for indigent offenders to speak and read languages other than English, and the report is not offered in any language but English. It is not uncommon for indigent offenders to be homeless or unstably housed, and therefore lack a fixed address to and from which a report can be mailed. In these scenarios, where the indigent offender would perhaps benefit the most from the continuing presumption of indigency, Division Three would impose appellate costs anyway. This unjust result is inconsistent with the policy reflected in RAP 14.2 and RAP 15.2 and therefore merits review as a matter of substantial public importance under RAP 13.4(b)(4).

E. CONCLUSION

Because he satisfies RAP 13.4(b)(1) and (4) review criteria, Manson asks that this petition for review be granted.

DATED this 3rd day of May, 2018.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

KEVIN A. MARCH
WSBA No. 45397
Office ID No. 91051
Attorneys for Petitioner

APPENDIX A

FILED
MARCH 1, 2018
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,	)	No. 35004-5-III
	)	
Respondent,	)	
	)	
v.	)	UNPUBLISHED OPINION
	)	
ELIJAH DEAN MANSON,	)	
	)	
Appellant.	)	

LAWRENCE-BERREY, J. — Elijah Dean Manson appeals after his conviction for the crime of possession of a controlled substance—heroin. He argues: (1) his trial counsel was ineffective for failing to object to evidence and for failing to request a limiting instruction regarding that evidence, (2) the judge submitted a jury instruction that was an improper comment on the evidence, and (3) cumulative error. We affirm.

FACTS

Officer Jeremy Maiuri recognized Mr. Manson in his car and knew he had an active warrant. Officer Maiuri directed Mr. Manson to pull over, and Mr. Manson complied. As the officer approached Mr. Manson's car, he could see Mr. Manson reaching down to his right side and putting his hands by his sides. Officer Maiuri ordered

Mr. Manson to keep his hands visible. When Mr. Manson did not comply, he was ordered out of his car.

As Mr. Manson got out of his car, Officer Maiuri ordered him to turn and place his hands behind his back. Mr. Manson turned with his hands up, made a strange motion with his hands, and placed them on top of his car. Officer Maiuri asked Mr. Manson if he had any objects that might stab him, and Mr. Manson replied he had a syringe in the pocket of a pair of pants still inside the car. Officer Maiuri handcuffed Mr. Manson, searched him, and placed him inside his patrol car.

Officer Kevin Huxoll arrived on the scene to assist Officer Maiuri. Officer Maiuri told Officer Huxoll about Mr. Manson's furtive movements, and Officer Huxoll sought and received consent from Mr. Manson to search his car. In addition to the syringe, the officers found a set of scales inside a boot and a spoon. Next, Officer Huxoll searched in the direction that Mr. Manson had made the strange hand movements. In some nearby grass opposite the car, he found a clear plastic "baggie" that contained heroin. Before Officer Huxoll could explain to Officer Maiuri what he found, Mr. Manson started yelling that whatever the officer found was not his and he would fight in court.

The State charged Mr. Manson with possession of a controlled substance—heroin, and unlawful use of drug paraphernalia. Mr. Manson had two trials. During the first

trial, the court dismissed with prejudice the charge of unlawful use of drug paraphernalia. During its deliberations, the jury asked the court to define "dominion," in reference to a jury instruction defining constructive possession. The jury later advised the court it could not reach a verdict, and the court declared a mistrial and dismissed the jury.

At the second trial, Officer Maiuri testified he stopped Mr. Manson because he recognized he had an active warrant. Officer Huxoll testified he knew Mr. Manson from previous contacts. Mr. Manson did not object to either statement.

Later, the court instructed the jury. One instruction defined "possession." That instruction read:

> Possession means having a substance in one's custody or control. It may be either actual or constructive. Actual possession occurs when the item is in the actual physical custody of the person charged with possession. Constructive possession occurs when there is no actual physical possession but there is dominion and control over the substance.
>
> Proximity alone without proof of dominion and control is insufficient to establish constructive possession. Dominion and control need not be exclusive to establish constructive possession.
>
> [In deciding whether the defendant had dominion and control over a substance, you are to consider all the relevant circumstances in the case. Factors that you may consider, among others, include [whether the defendant had the {immediate} ability to take actual possession of the substance,] [whether the defendant had the capacity to exclude others from possession of the substance,] [and] [whether the defendant had dominion and control over the premises where the substance was located]. No single one of these factors necessarily controls your decision.]

Clerk's Papers (CP) at 52 (alterations in original). Neither party objected to this instruction. The jury found Mr. Manson guilty of possession of a controlled substance—heroin. The trial court later entered a judgment of conviction and sentenced Mr. Manson. He appealed.

ANALYSIS

A. EFFECTIVE ASSISTANCE OF COUNSEL

Mr. Manson contends he received ineffective assistance when trial counsel failed to object to one officer testifying that he stopped Mr. Manson for an active warrant and another officer testifying that he knew Mr. Manson from prior contacts. He also contends trial counsel was ineffective for failing to seek a limiting instruction. We do not believe that trial counsel provided ineffective assistance.

To meaningfully protect the right to counsel, an accused is entitled to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Courts apply a two-pronged test to determine if counsel provided effective assistance: (1) whether counsel performed deficiently, and (2) whether the deficient performance prejudiced the defendant. *Id.* at 687. If a defendant fails to establish one prong of the test, this court need not address the remaining prong. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). This is a mixed question of law

and fact, reviewed de novo. *Strickland*, 466 U.S. at 698.

To satisfy the first prong, the defendant must show that, after considering all the circumstances, counsel's performance fell below an objective standard of reasonableness. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). The burden is on the defendant to show deficient performance. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). We strongly presume trial counsel was effective. *Id.* When this court can characterize counsel's actions as legitimate trial tactics or strategy, we will not find ineffective assistance. *Id.*

1. *Decision not to object*

Mr. Manson argues that trial counsel should have stipulated to the lawfulness of his arrest or at least objected to the officers' testimonies. Being recognized as having an active warrant is not the worst thing that can precede an arrest. Had trial counsel stipulated to the lawfulness of the stop, the jury might have speculated about the underlying reason for the stop and possibly imagined worse things.

In addition, trial counsel's decision not to object to evidence is a classic example of trial tactics; only in egregious circumstances will it constitute deficient performance. *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). Here, had trial counsel objected to the first officer's testimony about the basis for the arrest, the court might have

overruled the objection and thus caused increased attention to the somewhat negative testimony. Had trial counsel objected to the second officer's testimony about prior contact, the objection could have caused increased attention to the irrelevant evidence. The State did not discuss the warrant or prior contact any further in the case, including closing argument. We conclude that the decision to not stipulate and to not object constituted legitimate trial tactics so the jury would not speculate or overemphasize somewhat negative testimony.

2. *Decision not to seek a limiting instruction*

Mr. Manson also contends his counsel was deficient by failing to seek a limiting instruction about the above evidence. We presume that the decision not to seek a limiting instruction is a legitimate trial tactic to avoid highlighting unfavorable evidence to a jury. *State v. Humphries*, 181 Wn.2d 708, 720, 336 P.3d 1121 (2014). Mr. Manson argues that this "presumption is overcome when defense counsel made no attempt whatsoever to exclude the admission of such information in the first place." Br. of Appellant at 15. He provides no authority for this contention.

Instead, he cites *Humphries* and *State v. Price*, 126 Wn. App. 617, 109 P.3d 27 (2005), two cases holding that the decision to seek a limiting instruction was a trial tactic rather than ineffective assistance of counsel. He contends these two cases are

distinguishable on the basis that counsel in those cases at least attempted to exclude evidence. While those cases are distinguishable on that point, that distinction does not overcome the presumption. Had trial counsel requested a limiting instruction, either party could have discussed the somewhat negative facts in light of that instruction. This might have caused the jury to unintentionally emphasize that information.

Mr. Manson also argues that his trial counsel was "asleep at the wheel." Br. of Appellant at 17. The trial record rebuts this argument. Mr. Manson's trial counsel obtained a dismissal of the drug paraphernalia charge in the first trial and also a mistrial. A trial attorney "asleep at the wheel" would not have obtained such results.

We conclude Mr. Manson has not overcome the strong presumption that he received effective assistance of counsel.

B. ERRONEOUS INSTRUCTION HARMLESS BEYOND A REASONABLE DOUBT

Mr. Manson argues the trial court improperly commented on the evidence when it instructed the jury on constructive possession despite insufficient evidence for such an instruction. We disagree.

Article IV, section 16 of the Washington Constitution provides: "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." This provision prohibits a judge from conveying their personal belief in the merits

of a cause or issue to the jury. *State v. Hughes*, 106 Wn.2d 176, 193, 721 P.2d 902 (1986). "An instruction does not constitute an impermissible comment on the evidence when there is sufficient evidence in the record to support it and when the instruction is an accurate statement of the law." *Id.* This court conducts a de novo review regarding whether a jury instruction amounts to a comment on the evidence. *State v. Butler*, 165 Wn. App. 820, 835, 269 P.3d 315 (2012).

It appears that the erroneous instruction was part of a set of instructions used for Mr. Manson's first trial. There, constructive possession of the drug paraphernalia in the car would have been at issue prior to dismissal of that charge. Trial court error implicating a constitutional right of a defendant will not cause a conviction to be reversed if the error was harmless beyond a reasonable doubt. *State v. Watt*, 160 Wn.2d 626, 635, 160 P.3d 640 (2007).

Here, Mr. Manson either possessed the baggie of heroin when he exited his car or he never possessed the contraband at all. The State argued that Mr. Manson actually possessed the contraband when he exited his car. Mr. Manson argued that he did not. The State never argued that Mr. Manson constructively possessed the contraband by its proximity nor would the erroneous instruction allow such an argument to be made.

We note that the first jury could not reach a verdict. The record establishes that the

jurors in the first trial were confused about what "dominion" meant. There is no evidence that the second jury was similarly confused. Either Mr. Manson actually possessed the baggie of heroin as he exited his car or he did not. We conclude that the erroneous instruction could not have contributed to Mr. Manson's conviction and therefore was harmless beyond a reasonable doubt.

C. NO CUMULATIVE ERROR

Mr. Manson argues that his conviction should be reversed because of cumulative errors. A reviewing court may reverse a conviction when several trial court errors, insufficient to reverse in themselves, combine to deny a defendant a fair trial. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). Mr. Manson has only established one error, an error that we concluded was harmless beyond a reasonable doubt. We therefore reject his cumulative error argument.

D. AWARD OF APPELLATE COSTS DEFERRED

By motion dated June 7, 2017, Mr. Manson raises various arguments why this court should deny an award of appellate costs to the State. He argues (1) this division's June 2016 general order conflicts with RAP 14.2, (2) funding the Office of Public Defense (OPD) on the backs of indigent defendants creates a conflict of interest, (3) imposing costs on indigent persons without assessing their ability to pay violates

substantive due process, and (4) this court should deny the State an award of appellate costs in accordance with RAP 14.2. We deny Mr. Manson's first three arguments and defer the last argument to our commissioner.

1. *Our June 2016 general order is not inconsistent with RAP 14.2*

This court's June 2016 general order requires a defendant who, on the basis of his or her indigency, wishes this court not to award the State appellate costs, to make a timely request and to submit a simple two-page form. The form assists this court in determining to what extent, if any, the defendant can pay an award of appellate costs.

Mr. Manson argues that the order conflicts with the presumption of continued indigency afforded by RAP 14.2. That rule presumes that a defendant, found to be indigent for purposes of appeal, remains indigent throughout the appeal. We disagree with Mr. Manson's argument. There is nothing in this court's June 2016 general order that alters the presumption of indigency.

2. *There is no evidence that OPD is funded on the backs of indigent defendants*

Mr. Manson argues that funding the OPD on the backs of indigent defendants creates a conflict of interest between appellate counsel and their clients. Mr. Manson's argument wrongly assumes that indigent defendants are required to pay appellate costs. RAP 14.2, as well as this court's June 2016 general order, is designed to prevent indigent

defendants from being burdened with appellate costs. Appellate costs are to be imposed only on those defendants who *are* capable of paying some or all of their appellate costs without resort to exempt monthly benefits.

Moreover, every appellate attorney must counsel his or her nonindigent client on the financial consequences of losing an appeal, including paying for one's own attorney's fees. If such candid discussions with nonindigent clients created an impermissible conflict of interest, the appellate system would crumble.

3. *Appellate costs are not imposed against defendants without first assessing their ability to pay*

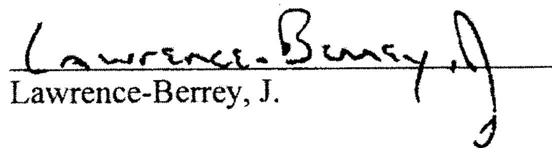
Mr. Manson argues that imposing appellate costs on indigent persons without assessing their ability to pay violates substantive due process. Mr. Manson's argument wrongly assumes that courts impose appellate costs against defendants without first assessing their ability to pay. The current system does not impose appellate costs against defendants without first assessing their ability to pay. *See* RAP 14.2.

4. *We defer to our commissioner whether the State should be denied an award of appellate costs in accordance with RAP 14.2*

Mr. Manson requests that we deny the State an award of appellate costs in accordance with RAP 14.2. As permitted by that rule, we defer that question to our commissioner.

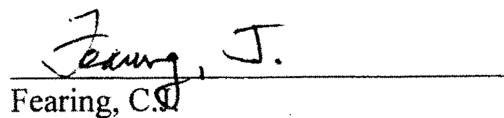
Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

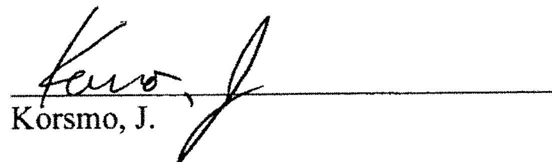


Lawrence-Berrey, J.

WE CONCUR:



Fearing, C.J.



Korsmo, J.

APPENDIX B

FILED
APRIL 3, 2018
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 35004-5-III**
	)	
Respondent,	)	
	)	
v.	)	**ORDER DENYING**
	)	**MOTION FOR**
ELIJAH DEAN MANSON,	)	**RECONSIDERATION**
	)	
Appellant.	)	

The court has considered appellant's motion for reconsideration and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED the motion for reconsideration of this court's decision of March 1, 2018, is denied.

PANEL: Judges Lawrence-Berrey, Fearing, and Korsmo

FOR THE COURT:

Lawrence-Berrey, C.J.
ROBERT LAWRENCE-BERREY
CHIEF JUDGE

APPENDIX C

General Orders of Division III

In RE the Matter of Court Administration Order RE: Request to Deny Cost Award

The Court of Appeals
of the
State of Washington
Division III

IN RE THE MATTER OF COURT)
ADMINISTRATION ORDER RE:)
REQUEST TO DENY COST AWARD)
) GENERAL COURT ORDER
_______________________________)

For an adult offender convicted of an offense who wishes the court to exercise its discretion not to award cost
substantially prevails on appeal, effective immediately,

IT IS HEREBY ORDERED:

(1) Under RAP 14.2, the commissioner or clerk will award costs to the party that substantially prevails on revi
directs otherwise in its decision terminating review." In most cases, the decision terminating review (which is
court's decision on the merits.

(2) An adult offender convicted of an offense who wishes this court to exercise its discretion not to award cos
substantially prevails on appeal must make the request and provide argument in support of the request, toge
authority and references to relevant parts of the record, in the offender's opening brief or by motion as provic
Appeal. Any such motion must be filed and served no later than 60 days following the filing of the appellant's
17.4 apply to the motion's content, filing and service and to the submission and service of any answer or repl

(3) If inability to pay is a factor alleged to support the request, then the offender should include in the record
exhibits, and the report of proceedings relating to the trial court's determination of indigency and the offende
pay discretionary financial obligations. The offender shall also file a report as to continued indigency and like
award of costs on the form set forth below. The original report, signed by the offender under penalty of perjur
and a copy shall be served on the respondent no later than 60 days following the filing of the appellant's ope

(4) The panel issuing the opinion shall address the request or decide the motion in the opinion. Its decision n
clerk to award costs subject to criteria identified by the panel.

Dated this 10th day of June, 2016

FOR THE COURT:

GEORGE B.FEARING
CHIEF JUDGE

RECORDS
Case Records
Caseload Reports
Court Dates
Judicial Information System (JIS)
JIS LINK
Odyssey Portal
Records Requests

RESOURCES
Civic Learning
Court News
Court Program Accessibility
Jury Duty
Procurement Opportunities
Resources, Publications, and Reports
Self Help
State Law Library
Whistleblower Policy

QUICK LINKS
Court Closures
Court Forms
Court Opinions
Court Rules
Domestic Violence Forms
Emergency Procedures
eService Center
Pattern Jury Instructions

TRANSLATIONS
中文形式/Chinese
한국어서류/Korean
Русский/Russian
Español/Spanish
Tiếng Việt/Vietnamese

Privacy and Disclaimer Notices Sitemap
© Copyright 2018. Washington State Administrative Office of the Courts.

APPENDIX D

indigency. The party shall submit a Motion for Order of Indigency, in the form prescribed by the Office of Public Defense.

(b) Action by the Trial Court. The trial court shall determine the indigency, if any, of the party seeking review at public expense. The determination shall be made in written findings after a hearing, if circumstances warrant, or by reevaluating any order of indigency previously entered by the trial court. The court:

(1) shall grant the motion for an order of indigency if the party seeking public funds is unable by reason of poverty to pay for all or some of the expenses for appellate review of:

(A) criminal prosecutions or juvenile offense proceedings meeting the requirements of RCW 10.73.150.

(B) dependency and termination cases under RCW 13.34,

(C) commitment proceedings under RCW 71.05 and 71.09,

(D) civil contempt cases directing incarceration of the contemner,

(E) orders denying petitions for writ of habeas corpus under RCW 7.36, including attorneys' fees upon a showing of extraordinary circumstances, and

(F) any other case in which the party has a constitutional or statutory right to counsel at all stages of the proceeding: or

(2) shall deny the motion for an order of indigency if a party has adequate means to pay all of the expenses of review. The order denying the motion for an order of indigency shall contain findings designating the funds or source of funds available to the party to pay all of the expenses of review.

(c) Other Cases. In cases not governed by subsection (b) of this rule, the trial court shall determine in written findings the indigency, if any, of the party seeking review. The party must demonstrate in the motion or the supporting affidavit that the issues the party wants reviewed have probable merit, which will be determined by the Supreme Court pursuant to subsection (d) of this paragraph. The party must further demonstrate the party has a constitutional or statutory right to review partially or wholly at public expense, the right to which will also be determined by the Supreme Court pursuant to subsection (d) of this paragraph.

(1) *Party Not Indigent.* The trial court shall deny the motion if a party has adequate means to pay all of the expenses of review. The order denying the motion for an order of indigency shall contain findings designating the funds or sources of funds available to the party to pay all of the expenses of review.

(2) *Party Indigent.* If the trial court finds the party seeking review is unable by reason of poverty to pay for all or some of the expenses of appellate review, the trial court shall enter such findings, which shall be forwarded to the Supreme Court for consideration, pursuant to section (d) of this rule. The trial court shall determine in those findings the portion of the record necessary for review and the amount, if any, the party is able to contribute toward the expense of review. The findings shall conclude with an order to the clerk of the trial court to promptly transmit to the Supreme Court, without charge to the moving party, the findings of indigency, the affidavit in support of the motion, and all other papers submitted in support of or in opposition to the motion. The trial court clerk shall promptly transmit to the Supreme Court the papers designated in the findings of indigency.

(d) Action by Supreme Court. If findings of indigency and other papers relating to the motion for an order of indigency are transmitted to the Supreme Court, the Supreme Court will determine whether an order of indigency in that case should be entered by the superior court. The determination will be made by a department of the Supreme Court on a regular motion day without oral argument and based only on the papers transmitted to the Supreme Court by the trial court clerk, unless the Supreme Court directs otherwise. If the Supreme Court determines that the party is seeking review in good faith, that an issue of probable merit is presented, and that the party is entitled to review partially or wholly at public expense, the Supreme Court will enter an order directing the trial court to enter an order of indigency. In all other cases, the Supreme Court will enter an order denying the party's motion for an order of indigency. The clerk of the appellate court will transmit a copy of the order to the clerk of the trial court and notify all parties of the decision of the Supreme Court.

(e) Order of Indigency. An order of indigency shall designate the items of expense which are to be paid with public funds and, where appropriate, the items of expense to be paid by a party or the amount which the party must contribute toward the expense of review. The order shall designate the extent to which public funds are to be used for payment of the expense of the record on review, limited to those parts of the record reasonably necessary to review issues argued in good faith. The order of indigency must be transmitted to the appellate court as a part of the record on review.

(f) Continued Indigency Presumed. A party and counsel for the party who has been granted an order of indigency must bring to the attention of the appellate court any significant improvement during review in the financial condition of the party. The appellate court will give a party the benefits of an order of indigency throughout the review unless the appellate court finds the party's financial condition has improved to the extent that the party is no longer indigent.

(g) Appointment and Withdrawal of Counsel in Appellate Court. The appellate court shall determine questions relating to the appointment and withdrawal of counsel for an indigent party on review. The Office of Public Defense shall, in accordance with its indigent appellate representation policies, provide the names of indigent appellate counsel to the appellate courts on a case-by-case basis. If trial counsel is not appointed, trial counsel must assist counsel appointed for review in preparing the record.

(h) Review of Order or Finding of Indigency. A party in a case of a type listed in section (b)(1) of this rule may seek review of an order denying an order of indigency entered by a trial court. A party may also seek review of written findings under section (c)(1) of this rule that the party is not indigent. Review must be sought by a motion for discretionary review.

(i) Withdrawal of Counsel in Appellate Court. If counsel can find no basis for a good faith argument on review, counsel should file a motion in the appellate court to withdraw as counsel for the indigent as provided in rule 18.3(a).

[Amended effective July 2, 1976; July 1, 1978; January 1, 1980; September 1, 1994; June 1, 1999; December 28, 1999; December 24, 2002; amended September 9, 2004, effective July 1, 2005; amended effective January 3, 2006; September 1, 2010; January 31, 2017; September 1, 2017.]

Rules of Appellate Procedure

RAP 15.2
DETERMINATION OF INDIGENCY AND RIGHTS OF INDIGENT PARTY

(a) Motion for Order of Indigency. A party seeking review in the Court of Appeals or the Supreme Court partially or wholly at public expense must move in the trial court for an order of indigency. The party shall submit a Motion for Order of Indigency in the form prescribed by the Office of Public Defense.

(b) Action by the Trial Court. The trial court shall determine the indigency, if any, of the party seeking review at public expense. The determination shall be made in written findings after a hearing, if circumstances warrant, or by reevaluating any order of indigency previously entered by the trial court. The court:

(1) shall grant the motion for an order of indigency if the party seeking public funds is unable by reason of poverty to pay for all or some of the expenses for appellate review of:

(A) criminal prosecutions or juvenile offense proceedings meeting the requirements of RCW 10.73.150,

(B) dependency and termination cases under RCW 13.34,

(C) commitment proceedings under chapters 71.05 and 71.09 RCW,

(D) civil contempt cases directing incarceration of the contemner,

(E) orders denying petitions for writ of habeas corpus under chapter 7.36 RCW, including attorneys' fees upon a showing of extraordinary circumstances, and

(F) any other case in which the party has a constitutional or statutory right to counsel at all stages of the proceedings; or

(2) shall deny the motion for an order of indigency if a party has adequate means to pay all of the expenses of review. The order denying the motion for an order of indigency shall contain findings designating the funds or source of funds available to the party to pay all of the expenses of review.

(c) Other Cases. In cases not governed by subsection (b) of this rule, the trial court shall determine in written findings the indigency, if any, of the party seeking review. The party must demonstrate in the motion or the supporting affidavit that the issues the party wants reviewed have probable merit, which will be determined by the Supreme Court pursuant to subsection (d) of this paragraph, the party must further

demonstrate the party has a constitutional or statutory right to review partially or wholly at public expense, the right to which will also be determined by the Supreme Court pursuant to subsection (d) of this paragraph.

(1) Party Not Indigent. The trial court shall deny the motion if a party has adequate means to pay all of the expenses of review. The order denying the motion for an order of indigency shall contain findings designating the funds or source of funds available to the party to pay all of the expenses of review.

(2) Party Indigent. If the trial court finds the party seeking review is unable by reason of poverty to pay for all or some of the expenses of appellate review, the trial court shall enter such findings, which shall be forwarded to the Supreme Court for consideration, pursuant to section (d) of this rule. The trial court shall determine in those findings the portion of the records necessary for review and the amount, if any, the party is able to contribute toward the expense of review. The findings shall conclude with an order to the clerk of the trial court to promptly transmit to the Supreme Court, without charge to the moving party, the findings of indigency, the affidavit in support of the motion, and all other papers submitted in support of or in opposition to the motion. The trial court clerk shall promptly transmit to the Supreme Court the papers designated in the findings of indigency.
(d) Action by Supreme Court. If findings of indigency and other papers relating to the motion for an order of indigency are transmitted to the Supreme Court, the Supreme Court will determine whether an order of indigency in that case should be entered by the superior court. The determination will be made by a department of the Supreme Court on a regular motion day without oral argument and based only on the papers transmitted to the Supreme Court by the trial court clerk, unless the Supreme Court directs otherwise. If the Supreme Court determines that the party is seeking review in good faith, that an issue of probable merit is presented, and that the party is entitled to review partially or wholly at public expense, the Supreme Court will enter an order directing the trial court to enter an order of indigency. In all other cases, the Supreme Court will enter an order denying the party's motion for an order of indigency. The clerk of the appellate court will transmit a copy of the order to the clerk of the trial court and notify all parties of the decision of the Supreme Court.

(e) Order of Indigency. An order of indigency shall designate the items of expense which are to be paid with public funds and, where appropriate, the items of expense to be paid by a party or the amount which the party must contribute toward the expense of review. The order shall designate the extent to which public funds are to be used for payment of the expense of the record on review, limited to those parts of the record reasonably necessary to review issues argued in good faith. The order of indigency must be transmitted to the appellate court as a part of the record on review.

(f) Continued Indigency Presumed. A party and counsel for the party who has been granted an order of indigency must bring to the attention of the appellate court any significant improvement during review in the financial condition of the party. The trial court will give a party the benefits of an order of indigency throughout the review unless the appellate court finds the party's financial condition has improved to the extent that the party is no longer indigent.

(g) Appointment and Withdrawal of Counsel in Appellate Court. The appellate court shall determine questions relating to the appointment and withdrawal of counsel for an indigent party on review. The Office of Public Defense shall, in accordance with its indigent appellate representation policies, provide the names of indigent appellate

counsel to the appellate courts on a case-by-case basis. If trial counsel is not appointed, trial counsel must assist counsel appointed for review in preparing the record.

(h) Review of Order or Finding of Indigency. A party in a case of a type listed in section (b)(1) of this rule may seek review of an order denying an order of indigency entered by a trial court. A party may also seek review of written findings under section (c)(1) of this rule that the party is not indigent. Review must be sought by a motion for discretionary review.

(i) Withdrawal of Counsel in Appellate Court. If counsel can find no basis for a good faith argument on review, counsel should file a motion in the appellate court to withdraw as counsel for the indigent as provided in rule 18.3(a).

[Adopted effective July 1, 1976; amended effective July 2, 1976; July 1, 1978; January 1, 1980; September 1, 1994; June 1, 1999; December 28, 1999; December 24, 2002; September 9, 2004 July 1, 2005; January 3, 2006; September 1, 2010; January 31, 2017; September 1, 2017.]

Click here to view in a PDF.

RECORDS
Case Records
Caseload Reports
Court Dates
Judicial Information System (JIS)
JIS LINK
Odyssey Portal
Records Requests

RESOURCES
Civic Learning
Court News
Court Program Accessibility
Jury Duty
Procurement Opportunities
Resources, Publications, and Reports
Self Help
State Law Library
Whistleblower Policy

QUICK LINKS
Court Closures
Court Forms
Court Opinions
Court Rules
Domestic Violence Forms
Emergency Procedures
eService Center
Pattern Jury Instructions

TRANSLATIONS
中文形式/Chinese
한국어서류/Korean
Русский/Russian
Español/Spanish
Tiếng Việt/Vietnamese

Privacy and Disclaimer Notices Sitemap
© Copyright 2018. Washington State Administrative Office of the Courts.

APPENDIX E

PROPOSED AMENDMENT

RULES OF APPELLATE PROCEDURE

RAP 14.2

WHO IS ENTITLED TO COSTS

A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review, or unless the commissioner or clerk determines an adult offender for whom an order of indigency has been entered does not have the current or likely future ability to pay such costs. An indigent adult offender who objects to a cost bill pursuant to RAP 14.5 shall file a report as to continued indigency and likely future ability to pay an award of costs on a form prescribed by the office of public defense. The form need not reiterate information contained in the trial court indigency screening form, but shall include supplemental information necessary to provide a basis for making a determination with respect to the individual's current or likely future ability to pay such costs. The form shall include a certification that no significant improvement during review in the financial condition of the indigent adult offender has occurred or, if a significant improvement during review in the financial condition has occurred, shall describe such improvements. If there is no substantially prevailing party on review, the commissioner or clerk will not award costs to any party. An award of costs will specify the party who must pay the award. In a criminal case involving an indigent juvenile or adult offender, an award of costs will apportion the money owed between the county and the State. A party who is a nominal party only will not be awarded costs and will not be required to pay costs. A "nominal party" is one who is named but has no real interest in the controversy.

Unless the parties agree that a cost bill will not be filed under RAP 14.2, an adult offender for whom an order of indigency has been entered should include in the record on review clerk's papers, exhibits, and the report of proceedings relating to the trial court's determination of the offender's current or likely future ability to pay discretionary legal financial obligations.

NIELSEN, BROMAN & KOCH P.L.L.C.

May 03, 2018 - 12:52 PM

Transmittal Information

Filed with Court:	Court of Appeals Division III
Appellate Court Case Number:	35004-5
Appellate Court Case Title:	State of Washington v. Elijah Dean Manson
Superior Court Case Number:	15-1-00327-2

The following documents have been uploaded:

- 350045_Petition_for_Review_20180503125116D3238516_0918.pdf
  This File Contains:
  Petition for Review
  The Original File Name was PFR 35004-5-III.pdf

A copy of the uploaded files will be sent to:

- jnagle@co.walla-walla.wa.us
- nielsene@nwattorney.net
- tchen@co.franklin.wa.us

Comments:

Copy mailed to: Elijah Manson 1928 Amelia St Walla Walla, WA 99362

Sender Name: John Sloane - Email: Sloanej@nwattorney.net
Filing on Behalf of: Kevin Andrew March - Email: MarchK@nwattorney.net (Alternate Email:)

Address:
1908 E. Madison Street
Seattle, WA, 98122
Phone: (206) 623-2373

Note: The Filing Id is 20180503125116D3238516